

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**CHERYL K. CARLSON and  
DENNIS E. CARLSON, as Personal  
Representative for the ESTATE OF  
SHIRLEY CARLSON,**

**Plaintiffs,**

**vs.**

**FREIGHTLINER L.L.C, a  
Delaware Corporation,**

**Defendant.**

**CASE NO. 4:03-CV-3208**

**STATEMENT OF APPEAL OF  
MAGISTRATE JUDGE'S ORDER**

COMES NOW the Defendant, Freightliner, L.L.C., by and through counsel and pursuant to Fed. R. Civ P. 72(a) and NELR 72.3 appeals the Magistrate Judge's Memorandum and Order dated March 19, 2004, by the Honorable David L. Piester (Filing No. 35) because it is clearly erroneous and contrary to law for the following reasons:

1. The Court has yet to rule on the Motion to Determine Choice of Law Regarding Punitive Damages filed by the Plaintiff on December 31, 2003. (Filing No. 26). Some of the discovery requests that are at issue in the Memorandum and Order deal with the punitive damage issue. If the Court should determine that Oregon's law on punitive damages is inapplicable to this case many of the discovery requests at issue will be irrelevant. The Defendant believes it is premature to respond to these requests prior to

the Court's ruling on the Motion to Determine Choice of Law Regarding Punitive Damages filed by the Plaintiff.

2. The Magistrate Judge has given the Defendant ten days to respond to the discovery requests at issue in his Memorandum and Order. (Filing No. 35). This is too short a time to do so. It does not even take into consideration the appeal time provided to the Defendant in NELR 73.2. It is not possible for the Defendant to respond in such a short time given that the Defendant is not in the State of Nebraska.
3. The Magistrate Judge incorrectly determined that expenses and fees should be awarded to the Plaintiff pursuant to Fed. R. Civ. P. 37 (a)(4)(A) because the Defendant's position was not "substantially justified" and that other circumstances would not make the award of expenses and fees unjust as a result of the Defendant not filing a response to the Plaintiffs' Motion to Compel.

WHEREFORE, the Defendant respectfully requests that the Court reverse the Magistrate Judge's Memorandum and Order (Filing No. 35) as being clearly erroneous and contrary to law.

DATED this 26th day of March, 2004.

FREIGHTLINER L.L.C., Defendant,

By: s/Melanie J. Whittamore-Mantzios, #18883  
Wolfe Snowdeh Hurd Luers & Ahl, LLP  
Suite 830, Wells Fargo Center  
1248 "O" Street  
Lincoln, NE 68508  
(402) 474-1507

**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2004, I electronically filed the foregoing **STATEMENT OF APPEAL OF MAGISTRATE JUDGE'S ORDER** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

David S. Houghton  
Robert W. Mullin  
LIEBEN, WHITTED, HOUGHTON,  
SLOWIACZEK & CAVANAGH, P.C., L.L.O.  
100 Scoular Building,  
2027 Dodge Street  
Omaha, NE 68102

By: s/Melanie J. Whittamore-Mantzios, #18883  
Wolfe Snowden Hurd Luers & Ahl, LLP  
Suite 830, Wells Fargo Center  
1248 "O" Street  
Lincoln, NE 68508  
(402) 474-1507.